

Neutral Citation No. 2010 EWHC 3613 (Qb)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
LIVERPOOL DISTRICT REGISTRY

Claim No. 9LV12383

35 Vernon Street
Liverpool

Wednesday, 22nd December 2010

Before:

HIS HONOUR JUDGE GORE QC

Between:

BARBARA HILL

Claimant

-v-

MASTER CONCRETE NORTHERN LIMITED

Defendant

Counsel for the Claimant:

MR. COWAN

Counsel for the Defendant:

MR. KENNEDY QC

JUDGMENT APPROVED BY THE COURT

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APPROVED JUDGMENT

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1. THE JUDGE: There is no dispute, firstly, that on Tuesday, 20th November 2007 shortly before 11.00 am at a junction that was busy with both vehicles and pedestrians a cement lorry owned by the defendant, being driven by their employee, Mr Watson, in the course of his employment broadly in a southwesterly direction along Walton Vale, Liverpool turned left out of that main road into Regina Road. There is also no dispute, secondly, that in doing so it encountered the claimant pedestrian who had been on essentially the east footway north of the junction and intended to cross Regina Road and continue south of the junction. There is also no dispute, thirdly, that in doing so the lorry drove on to the claimant's leg where it came to rest until reversed off her and she sustained serious injuries, necessitating an amputation. In this action she claims damages for injuries and loss sustained, and at this stage the only issue before me is that of liability.

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2. The allegations are quite simple but deciding them is quite difficult. For the claimant Mr Cowan submits quite simply that as Mr Watson was turning into the side road the claimant, in her red coat, was there to be seen and avoided as she crossed from north to south and that Mr Watson either did not look properly or at all. Mr Kennedy QC, who appears for the defendant, acknowledges that Mr Watson did not see the claimant until after she was under his wheels to the nearside of his lorry, but submits that that was because as he turned into the road she simply walked into the side of his lorry which was being driven slowly and carefully and had not commenced the turn until the road was clear.

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3. The evidence is both internally inconsistent in parts and inconsistent as between witnesses and it is that which makes this case difficult to decide. In an attempt to make it easier to decide, accident reconstruction evidence has been called from experts well known to the courts by both parties; Mr Peter Jennings on behalf of the claimant and Dr John Searle on behalf of the defendant. There are great limitations to the deployment of expert evidence in cases such as this. Despite detailed cross-examination by Mr Kennedy, Mr Jennings maintained that his expert contribution was dependent upon questions of fact which he properly acknowledged were matters for me as the judge. For that reason he rejected many propositions put to him as dependent on factual findings on a range of points, not just one or two. Dr Searle based some of his opinions on critical issues on a reconstruction filmed and timed, but he conceded and accepted that whether that was accurate depended on whether the reconstruction was being done in exactly the same way as the event unfolded on the day, which itself was a question of fact for the judge to decide.

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4. I find it inherently unlikely that a reconstruction will replicate an event when that ultimately depends, as Dr Searle accepted to be critical, on the relative movements and speeds of pedestrian and vehicle to each other, and in particular to the ratio of the speeds of both to each other. There are too many variables, none of which are fixed or defined by irrefutable physical evidence. They include but are not limited to the exact line of the pedestrian, the exact line of the vehicle, whether the vehicle was stopping and starting or juddering or being driven in a smooth turn, the speed of the pedestrian, the speed of the vehicle, where the driver of the vehicle was looking and when and what, if any, posture alterations he either did make or could have made to alter or improve his view.

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MR. Kennedy: I must apologize; I am struggling to keep up making a note.

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5. THE JUDGE: Mr Jennings repeatedly qualified his opinions by saying, so to speak, if the fact was X then the conclusion Y could be drawn. By way of examples, in his report at page 94 of the trial bundle at paragraph 11.3 he said:

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“It is a matter for the court to determine her actions prior to entering the roadway but Mrs Hill’s recollection is consistent with that of Mr Jones, that she was walking along the footway for several seconds prior to crossing rather than stationary.”

He continues at paragraph 11.4:

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“If she was walking on the footway rather than stationary Mr Watson appears to have failed to notice her at that time.”

Similarly, at page 99 in the trial bundle at paragraph 15.4 Mr Jennings says:

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“If Mrs Hill was walking towards the road rather than stationary Mr Watson appears to have failed to notice her or, if he did notice her, he did not identify the potential hazard represented by her continued motion prior to entering the roadway.”

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6. Dr Searle, however, at several points asserts as fact and without such similar qualifications. Examples of that can be found at the trial bundle page 180 where he says this between paragraphs 13.1 and 13.3:

“13.1 It would appear that as Mrs Hill approached the end of Regina Road she stopped briefly. Mrs Hill then set off to cross but it would appear that she had not taken another look to her right. A large cement lorry was entering Regina Road and, had a look to the right been made, it could not have been overlooked.

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13.2 When Mrs Hill set off she could not be seen [*I think that should read ‘be seen’*] by the driver of the lorry. He, of course, was engaged in steering the lorry into the narrow confines of Regina Road but even if he looked away to check down his nearside Mrs Hill could not be seen.

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13.3 Mr Watson had seen Mrs Hill stationary waiting to cross. When Mrs Hill did move, only some one and a half seconds remained before contact occurred. That was too short to take avoiding action even if Mrs Hill had been seen to move.”

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7. In saying as he did it would appear that Mrs Hill stopped at the end of Regina Road, she stopped briefly. There was in fact no such evidence until Mr Ray gave oral testimony in this case, to which issue I will return in a moment. When he said at paragraph 13.2 that when Mrs Hill set off she could not be seen by the driver of the lorry, that is a question of fact for me to decide and not something that is demonstrated unequivocally by evidence, and when he said at paragraph 13.3 that Mr Watson had seen Mrs Hill stationary waiting to cross, no such evidence has in fact been led before me at this trial, and indeed Mr Watson’s case has always been that he only ever saw Mrs Hill for the

A first time when she was under the wheels of his lorry. In similar vein at page 229 at paragraph 6.1 Dr Searle says that:

“Mr Watson, the driver of the lorry, indicates that he was well into his manoeuvre when the pedestrian walked into the road.”

B As I have indicated, Mr Watson in his evidence has always maintained that he never saw the pedestrian walk into the road, and only ever saw her for the first time when she was under the wheels of the lorry and, therefore, again as an assertion of fact driving the expert opinions that he was about to express or had expressed, he was not accurate.

C 8. It was put by Mr Cowan to him that his approach demonstrated that he had crossed the Civil Procedure Rule Part 35 line, out from the territory of being an objective expert seeking to assist the court and into the role of advocate. He denied that. It was also put to him that in so acting he failed to acknowledge or act upon precisely such criticisms made of him in other cases, in particular by Griffith Williams J in *Smith-v- Finch [2009] EWCH 53 QB* and the relevant remarks are to be found at paragraph 30 but I will not burden this judgment with recitation of that passage, and also Coulson J in *Stewart - v- Glaze [2009] EWHC 704 QB* and, again, the relevant passage is to be found at paragraph 48 and, again, I will not burden this judgment by reciting the full passage. Dr Searle did not agree with those criticisms and he prays in aid that his evidence has been accepted in about three quarters of the cases in which he has been instructed, and sometimes, he says, that rises to four fifths. I do not know anything about the circumstances of those cases or what was being accepted or, for that matter, rejected in them and, therefore, I find that to be an unhelpful reply. Nor is the simple fact of Dr Searle’s recitations which he has made in his report and in his supplementary report sufficient to deal with Mr Cowan’s criticism.

D 9. It is right to record, however, that at page 172 Dr Searle does say in paragraph 1.2:

E “The function of such a report is to make inferences from physical evidence, including calculations and tests regarding the events which have occurred and the accounts given by witnesses. To show the basis for such inferences the report summarises the evidence as it appears at the time of writing but without any implication that the evidence is to be accepted.”

F In similar vein, at page 228 in his supplementary report at paragraph 1.3 he says, “The evaluation of witness evidence is, of course, a matter for the court.” As I say, those protestations are made in the body of his reports, but it is for me to decide as a question of fact whether that is in fact the way that Dr Searle has behaved in approaching his task as an expert in this case. Also it is right for me to observe that just because one or two judges on particular days in particular cases formed a particular view about this expert and his approach does not bind me in any way to form that view in this case, but I do draw attention to the contrast between Mr Jennings’ approach, hedged about with qualification, sensitive to the fact-finding role of the judge, and Dr Searle’s approach, rather dogmatically asserting as fact what is no more than his interpretation of the witness evidence and doing so without qualification and without, until that is pointed out to him in cross-examination, acknowledging that these are matters of fact for the judge to decide.

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10. In those circumstances I draw certain conclusions. Firstly, I do find that Dr Searle has moved away from expert and become advocate when he should not have done so, and that his approach, therefore, does lack the objectivity required of a Part 35 expert, and I do not accept that advocacy on matters of fact that are for me to decide. Secondly, expert evidence in this case is in fact of limited assistance and what I must do is to find the facts on the evidence, save to acknowledge that I must not find facts which experts demonstrate as a matter of evidence simply cannot be true. Thirdly, where experts can assist, which, in my judgment, is limited, and where there is a difference of opinion I prefer the opinions of Mr Jennings to those of Dr Searle.

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11. I turn, therefore, to the non-expert evidence in this case on which, in my judgment, the issues for me to decide turn. The claimant's evidence in chronological order is as follows. To the police she provided a statement dated 7th February 2008, some two and a half months post-accident, and in it she said:

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“On Tuesday, 20th November 2007 I was involved in an accident on Walton Vale, Liverpool 9 at its junction with Regina Road. I don't remember very much about the incident, which happened at about 10.55 am on that day. I know I was walking to the bus stop outside the Iceland store on Walton Vale to go to work. I catch the number 62 to go to Crosby where I work. This bus is scheduled to arrive at Iceland about 11.05 so I was not in a rush, I had plenty of time. I walked along this route practically every day. I remember I was walking on the same side as Iceland on Walton Vale towards Liverpool and I was approaching Regina Road where I wanted to cross. Regina Road is a small road off Walton Vale and I approached the edge of the kerb. There was no one else with me about to cross over the road. I cannot remember whether Walton Vale was busy with traffic at this time but it usually is very busy at this time of day. I remember I looked to my left down Regina Road, I saw no traffic approaching. I had already checked to my right to see if anything was going to turn into Regina Road but I saw nothing. I always cross over Regina Road a few steps into the road away from Walton Vale. I never cross over along the dotted lines at the end of the road. Before crossing I checked over my right shoulder again after looking left and I decided it was safe to cross. I saw no vehicles. I stepped off the kerb and I only took about two or maybe three steps when this wagon just appeared in front of me as if from nowhere. I jumped back trying to get out of its way and I thought I was going to fall backwards and hit my head on the ground. I don't remember what happened next.”

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In her witness statement dated 9th December 2010 she said at paragraph 2:

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“As I explained in my statement to the police, I do not remember very much at all about the incident. I remember even less now given the passage of time, but what I told the police is the best of my recollection.”

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12. She gave oral evidence and in cross-examination to me when cross-examined by Mr Kennedy she said this, “There was no one with me. I was on my own. There were other people around. I can't remember today beyond what is in the statement. I wouldn't cross if it wasn't safe to do so. I stopped. I had already checked to the right just before I was ready to cross the road. I didn't see the cement lorry. I can't remember if I should have seen it. As far as I was concerned it was safe to cross. That was not a mistaken view on my part.” Pausing there, it must have been a mistaken view

A on her part because the lorry was there. Continuing in cross-examination she said, "I didn't see a stationary Corsa to my left. I checked right twice. On both occasions I didn't see the lorry. I hadn't even got to the middle of the road. I don't remember hearing a warning. I can't remember if I looked left while crossing. It just seemed to appear from nowhere". By "it" she meant the lorry. "I didn't see it. I just saw it appear in front of me. I don't know if what I saw was the side. I remember looking to the right. If I'd seen it coming I wouldn't have walked across the road. I can't remember if I'd seen the car to the left stop and assumed it to be letting me cross".

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13. She is clearly wrong in a number of details. There being no evidence that the lorry was being driven at anything other than a slow speed, no less than walking pace and no more than five to eight miles an hour, in the second or two it took for her to get from the kerb to under its wheels it must have been there to be seen and avoided. It was huge, red and noisy. Given her diminutive stature - she is, I am told, only five foot one inches tall, so that her head would not come above the base of the passenger window if she stood right beside the lorry - that means that either she did not look right, not once, not twice as she says, or she did not do so properly because, had she done so, it is inconceivable that she would have crossed into its path or side. She also did not see the Corsa to her left. It too was plain to be seen. Mr Watson saw it. Did she stop? She says she did. So does Mr Ray, who was a pedestrian following somewhat behind her. I will return to that issue a little later. What was her line or path? That too is a little unclear. She says and all the evidence seems to confirm that she was not crossing actually in the mouth of the side road but a little back from it into Regina Road. She may have deviated a little east, that is away from the main road, from Walton Vale, so that she was further back from the natural building line on the east side of Walton Vale, but, since it was her intention to continue down Walton Vale, in my judgment she is unlikely to have deviated very far. None of the lay or expert witnesses really addressed this issue or help me on it.

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14. The next witness was Mr Ray. The first thing that he said to the police is recorded at page 265 of the trial bundle and it reads as follows:

"I was walking along Walton Vale towards Iceland. I came to the road junction opposite Boots. There was a woman crossing the road. At the same time a concrete lorry started driving from across Walton Vale in the same direction heading towards her. I shouted, 'Watch the lorry'. She stopped and looked to her left, the wrong way. The centre of the lorry knocked her over."

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I notice the tenses, "The woman crossing" - present tense. "At the same time the concrete lorry started". "She stopped". That implies that she was already in the road and that Mr Watson, the driver of the lorry, had stopped before he started to drive into Walton Vale.

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15. Next Mr Ray provided a rather fuller statement to the police. It is dated 29th November 2007 and in it he says this. I should observe this was only nine days after the accident:

"It takes me a good while to get about. I can remember that there was a large number of pedestrians about and traffic was very heavy. It always is around that time of day. I was walking along Walton Vale and crossed at the pelican crossing, which was on the phase for me to cross. It took me a long time to cross as I have spine trouble and I use a walking stick. I remember the traffic started to flow again and I made my way to Regina Road to cross so I could go

A to Iceland. It took me about three to four minutes to get to the road. I could see the traffic had come to a stop again, which I presumed was due to the pelican crossing. As I got to the last shop just before Regina Road I could see a woman wanting to cross. She was about two to three metres away from me. I then saw that she had taken two to three steps into Regina Road to cross. I looked to my left to see if anything was coming. As I looked to my right I could see a large truck with a cement mixer on its back. The truck had started to swing into the road. I would say it was half in Regina Road and half in B Walton Vale. I shouted to the woman to watch out for the truck. I saw the woman look to the left, the wrong way. She then looked to the right and as she did so she put her hand out to push herself off the truck. I think her bag must have got caught and she seemed to get sucked under the wheels. I went to the woman and saw she was badly injured. I put my coat under her and made my way back to the estate agents as fast as I could so they could get help. The C truck was only going at a very slow speed. The truck was kind of juddering as he was manoeuvring. I was about two to three metres away from the whole incident and I had a clear and unobstructed view of the accident."

D I notice he did not say that she stopped at the kerb and I also notice that he did not say that she looked either left or right until after he shouted his warning, and even then he says that she looked first left, the wrong way, and only *then* (his word) right. He says, and I note, in relation to the lorry that it was driving at a "very low speed" (his word) and "kind of juddering".

- E 16. In a witness statement dated 14th September 2009 made for the purpose of these proceedings he marked some photographs with what he said were relevant positions, but I find that quite unhelpful because small numbers are placed to refer to much larger objects, in particular Mrs Hill. Also, until after she is run over, both she and the lorry are moving and such marking takes—

MR. ?: (*inaudible*) did you find it helpful or unhelpful?

F THE JUDGE: Unhelpful. I will start that sentence again. Also, until after she is run over, both she and the lorry are moving and such marking takes little or no account of such relative movements. The more helpful point that emerges is that he says that she was in the road not on the kerb when Mr Watson's lorry first entered (his phrase) Regina Road. He also said that the truck was "kind of juddering". As with his statement to the police, however, he made no mention of the claimant either stopping at the kerb or looking before she stepped into the road. That feature of both his police statement and his G witness statement is in marked contrast to his oral testimony.

- H 17. To me he said in chief, "Mrs Hill stopped. She looked left and as far as I know she looked right. The traffic was stationary. She started to cross the road. I'd got to the pavement. The traffic started again. This lorry was turning into Regina Road. I shouted, 'Watch the lorry'. It was more or less on top of her. She put her hands out practically on the centre of the cab. He was trying to turn, stopping and starting." He maintained this in cross-examination, even though these inconsistencies were put to him, suggesting simply, "Perhaps I missed it out", and explaining, "It takes a long time to get out of shock. I've had flashbacks. I've not filled in gaps with things I don't actually remember". That is not particularly impressive in a witness, although I accept that neither he nor any of the other lay witnesses were evasive or misleading or lying.

A All were trying to do their best to recall details of an event that lasted at most two seconds. I find that in parts Mr Ray also did speculate. For example, in his evidence to the effect that the driver was looking at the building to the driver's side and its overhanging canopy, although Mr Ray later accepted that the driver was on the opposite side of the cab and I doubt whether he could have seen what he was doing, especially when his attention was really focused on the claimant, whom he was trying to warn. B Having said that, there are parts of his evidence that I do accept; that he had got to the kerb, that she was further in front of him and, therefore, in the road and was there before the lorry started to turn, and its movement was juddering or, as the driver admitted, stop/start, not a smooth turn as Mrs Hesketh later suggested. She was in fact the next witness and was the driver of the Corsa, the car in Regina Road facing the lorry's approach and stopped because of it because it blocked her intention to turn right out of Regina Road into Walton Vale and, therefore, effectively travel in the opposite direction to the direction from which the cement lorry had approached. C

18. In her police statement on 24th November 2007 she said this:

D "As I approached the top of Regina Road with its junction with Walton Vale I had to stop about five to six car lengths from the junction as I could see a wagon turning into the road. Regina Road I would describe as a narrow side street. I saw the wagon take a wide berth so it could manoeuvre into the road. I then saw a lady a couple of steps off the pavement crossing Regina Road from the wagon's passenger side. I then said to my passenger, Anne, 'Oh, my God, he's going to hit her'. I then saw the lady hit the wagon face on, then turn and fall down under its wheels. The wagon rolled over her legs."

E Slightly later in the same statement she says:

"The whole incident lasted for approximately 30 to 40 seconds. The wagon was driving at a slow speed that I would expect for him to make that turning."

F In my judgment it was noteworthy that she only ever saw the claimant off the pavement, that is in the road, and that this was as the lorry was turning. She is, however, clearly mistaken in suggesting that the incident lasted as long as 30 or 40 seconds.

19. In her witness statement dated 6th October 2009 for the purpose of these proceedings she too tried to mark photographs with numbers which, again, I find to be as unhelpful as I did in the case of Mr Ray. She said in the narrative part of her statement:

G "6. When I was looking at the driver he seemed to be looking in his mirrors.

7. As far as I can recall the wagon had entered Regina Road when I first saw the claimant."

H So nearly two years after her police statement there is this subtle change of tense in paragraph 7 but on a critical detail.

20. In her oral testimony she told me in chief, "I was intending to go right. When it [*that is the lorry*] came into view I wouldn't be able to turn and that's why I stopped. I saw a lady a couple of steps into the road. I shouted to my colleague and she continued. When I caught sight of her she was already in the roadway." In cross-examination she

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said this, "When I first saw the wagon I had no feeling that an accident was about to happen". She was then asked a question by Mr Kennedy with which she agreed, the answer of which I wrote, therefore, in these terms, "It follows that she was not in the road". So what he was putting to her was that she cannot in fact have been in the road, but, in my judgment, that does not follow, as was suggested to her. Just because she had no feeling at first that an accident was about to happen does not mean that the claimant was not in the road, especially as she went on to say that the lorry was driving at a slow speed, but she and she alone says that the lorry was engaged in a smooth turn. I do reject that as being contrary to the balance of the evidence from other witnesses and she is the only witness to state that about Mr Watson's driving. She added in cross-examination, "She [*that is the claimant*] was seemingly oblivious to the wagon. She walked into the side of the wagon. That's how I saw it". That too is not what she said in either of her witness statements.

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21. Miss Goodwin, in my judgment, does not really take our knowledge further. She was a passenger in Mrs Hesketh's car and at the material time was looking down or away because in her statement to the police on 23rd November 2007 she said this:

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"As the vehicle started to turn I started to look around and I wasn't taking much notice of my surroundings. The next thing I know is Anne Hesketh shouted, 'Oh, my God, he's going to hit her' repeatedly. I looked up and saw a female in the middle of the road. I then saw the female get struck by the vehicle and she just crumpled. The vehicle carried on and I saw the wheels go over her."

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In her witness statement dated 25th June 2010 she said, and I quote from paragraph 5:

"I do not know whether or not the wagon had entered Regina Road when I first saw it."

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In her oral testimony she said, "As I looked up I've seen a lady getting hit by the cabin of the wagon". This, therefore, provides little help about the critical moments before, which she did not really witness.

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22. Mrs McBride and Mrs Evans do not really take matters further either, save that Mrs McBride describes the traffic generally and the lorry in particular as moving in a stop/start fashion rather than in a smooth turning manoeuvre as described by Mrs Hesketh.

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23. I turn then to Mr Watson. Mr Watson was, in my judgment, a careful and measured witness and I am entirely satisfied that he was trying to give a full, honest and accurate account. I also detected as he gave his evidence a quite clear tinge of regret and sadness that his vehicle had caused injury. That, however, does not mean that his account was without flaws or inconsistency. To the police on the day of the accident he said:

"I was driving my vehicle along Walton Vale with an intention to turn left into Regina Road. At a set of pelican crossings the lights were red and I had stopped. I had positioned my vehicle to the offside with my left indicator on. As the lights turned to green I moved off. I started the left turn and saw a number of pedestrians at the pavement. I checked and saw they were all

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stopped. As I started to straighten up I checked my mirrors again and saw a lady fall beneath the wheels of my vehicle.”

He signed that statement and it is timed at 12.05, which is but an hour or so after this accident.

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24. In oral testimony he says that he checked and signed this statement, but he says that the officer worded it, not him. He does refer to seeing “a number of pedestrians”, “all stopped” (his words) and that it was as he started to straighten up that he checked his mirrors again (his word) implying some sort of gap in time in checking.

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25. In his witness statement he says this between paragraphs 22 and 34:

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“I started indicating my intention to turn left approximately 20 to 30 feet before the pelican crossing. The traffic lights turned to red and I stopped at the pelican crossing to allow a group of pedestrians to cross the road in both directions. There were no vehicles in front of me at the crossing. The traffic lights changed to green and I waited until everyone had completely cleared the crossing. I was still stationary and indicating my intention to turn left. When all the pedestrians had cleared the crossing I proceeded through the pedestrian crossing, continuing to indicate my intention to turn left into Regina Road. As I proceeded through the pedestrian crossing there were a significant number of pedestrians on the pavement to my left. As usual I proceeded with caution, always keeping an eye on the pavement. There was no one on the pavement giving me any cause for concern. For example, there were no children and no one was doing anything out of the ordinary. There was a group of pedestrians waiting on the corner of Walton Vale and Regina Road to cross Regina Road. I was still indicating left. The pedestrians were all stopped to allow me to complete my manoeuvre, i.e. a left turn into Regina Road. I was travelling very slowly; I would estimate around five to eight miles an hour. The vehicle is fitted with a tachograph. As I started to complete my left turn onto Regina Road I regularly checked my nearside wing mirror, looking directly at pedestrians on my left hand side. I am certain that I did not clip or mount the pavement as I made the left turn onto Regina Road. Pedestrians will sometimes stand right on the edge of the kerb of the pavement and for that reason I am always careful when turning. No one looked as if they might step out. Everyone looked stationary. As I passed the pedestrians I also checked in front of me, behind me and to my right. Just as I again looked into my nearside wing mirror I saw a woman I now understand to be called Barbara under my second steer wheel on the left hand side of my lorry. Although I had cleared the left hand corner and was some way along Regina Road, I had not yet straightened up and my lorry was still facing towards the right hand side of Regina Road. I did not feel my lorry hit Barbara nor hear or see any commotion on the pavement. The first I was aware that something had happened was when I checked my nearside wing mirror and saw her there. I immediately braked. Because the wagon was travelling very slowly it stopped almost immediately.”

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26. Before providing that statement he had also given a lengthy interview to police, the transcript of which was put to him in cross-examination. In oral testimony to me he said this, “I went through the lights still indicating. When I got to the top of Regina Road I

A was waiting for the pedestrians to stop and when it was clear to do so I was making a left hand turn. I was checking my mirrors and what was going on around me". That is what he said in chief. This and his witness statement to that effect was new. In cross-examination he said, "When I got to Regina Road there were people crossing. I gave way to them as *The Highway Code* requires. The lorry came to a stop in Walton Vale while they were still crossing at the mouth of Regina Road before entering that road because pedestrians were crossing. It would not have been safe to enter the road", and B he acknowledged that he gave a very long interview to the police, and he accepted when that was put to him by Mr Cowan that there was no mention of this in his interview to the police. He went on, "As I approached there were people crossing and I stopped for them. I don't know why I never mentioned either that people were crossing or that I stopped for them. There is also no mention of it in my statement in this case". That is in fact not strictly accurate because there is mention of it, as I have indicated, in C paragraph 23 of his witness statement. The point is it is not mentioned either in his interview to the police or in his statement to the police an hour after the event. When asked to explain why that might be he said, "I've had time to think about it; over three years. Why I didn't mention it I can't think".

D 27. I rather take the view that, having heard all the other evidence, this represents how he likes to think he would have behaved rather than an actual memory of having done so on this day in 2007. I do, however, accept that he was stopping and starting during the turn because that is as was described by Mr Ray, and indeed he asserted it himself in the course of cross-examination when he said, "I was going at a speed that was right for the environment I was in. It was a case of stopping and starting. I was travelling at a slow speed. I was looking in my mirrors. They [*that is the pedestrians*] seemed to be on the pavement". "They" refer, as I have indicated, to pedestrians, as he had said to the police at the scene, but he was plainly wrong about this detail because as he turned into Regina Road Mrs Hill was in the road, as I have found, and indeed where he ran her over. He E saw Mr Ray stopped, not Mrs Hill. He never saw Mrs Hill, as he told me repeatedly, until he saw her beneath his wheels. She was wearing a red coat at the time. In my judgment he would have remembered that had he seen her before, but she was there or she would not have got under his wheels.

F 28. Did he look? If so, when? The clue, in my judgment, is this telling passage in the evidence he gave me, "I have no idea why I didn't tell the police that there were people crossing or that I stopped for them. I didn't tell it wrong, they were stationary. They seemed to be stationary at the time. I don't know why I used the word 'seemed'. It was all clear for me to turn left. I didn't know if pedestrians were stationary or walking. It was clear for me to turn left. I was just looking at the mouth of the road. It was clear". G "I was just looking at the mouth of the road". This, coupled with his remark to the police that, "As I started to straighten I checked my mirrors again" leads me to find that at the critical moment he did not look at the critical place. He accepted that the critical place was the nearside where his vehicle was, he said, the greatest danger to pedestrians of whom, plainly, there were many. Had he looked he either would have seen or ought to have seen that a woman in a red coat had disappeared from view and he knew that H there were blind spots and, therefore, that she might be in one and represent a hazard. The experts agree that it took her one and a half seconds, in my judgment probably up to but no more than two seconds, to get from the relative sanctuary of the pavement to the point of contact. I accept Mr Jennings' estimate that had he been looking in the right place at the right time, perception and reaction time combined would have been a second or less. I have found that he did not look at the right place at the right time,

A namely to his nearside as he turns, and that is what caused this accident. Had he done so his stop/start manoeuvre would not have started again, as it must have, to have brought him into contact with her.

29. Mr Kennedy in his submissions relies on the decision and reasoning in *Ahanonu –v- South East London and Kent Bus Company Limited* [2008] EWCA Civ 274. In particular he relies on an observation of Laws LJ at paragraph 23 in these terms:

B “The judge, as my Lord has said, has in effect sought to impose a counsel of perfection on the bus driver, Mr Votier. Such an approach I think distorts the nature of the bus driver's duty, which was of course no more nor less than a duty to take reasonable care. There is sometimes a danger in cases of negligence that the court may evaluate the standard of care owed by the defendant by reference to fine considerations elicited in the leisure of the courtroom, perhaps with the liberal use of hindsight. The obligation thus constructed can look more like a guarantee of the claimant's safety than a duty to take reasonable care.”

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D 30. Essentially, he submits, that that is what is being demanded of Mr Watson in his analysis of this case, and Laws LJ in making that observation is drawing attention to the rather fuller remarks of Collins LJ concerning the merits and evidence in the appeal which led him to the conclusion at the end of paragraph 20 of the judgment in these terms:

E “I accept the submission for the defendants that, taking into account human reaction times for responding, the reality of the situation where the turn takes only seconds is that, given the driver's concentration on the vehicle in front, even if he had by chance looked up and seen the claimant in his nearside mirror after pulling away, it would have been just as the accident was taking place. On the judge's finding it would have required constant but dangerous attention to the mirrors to have prevented the accident.”

F So it was that on the merits Collins, LJ with whom Black, J as she then was, and Laws LJ agreed, differed from the conclusions of the trial judge, but, in my judgment, *Ahanonu* was a very different case, as appears in fact from the rest of paragraph 20 of the judgment and in particular Collins' LJ acceptance of other specific dangers of which the driver effecting the left hand turn manoeuvre had to be particularly mindful, the first being that he was driving nose to tail behind another bus and there was a very real risk that if that bus suddenly braked he would drive into its rear and that demanded close attention to what was happening in front of him as well as beside him. Secondly, as the trial judge had found, this was an area well known for, if I can so describe it in general terms, pedestrian jaywalking, that the driver, therefore, had to be mindful of. This case is different because on the evidence, as Mr Watson accepted, the area of greatest danger to him and, therefore, the area that demanded the greatest attention was to his nearside as he effected the turn, and the reason for that was that he had already satisfied himself that there was nothing further along Regina Road that he was driving towards that represented a danger, and at the junction as he turned left he would be turning away from any pedestrians that might be crossing from south towards north, but he would be turning in towards any pedestrians that might be crossing from north towards south.

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31. Mr Kennedy also drew my attention to the decision in *Stewart* to which I have already referred for other reasons, and in particular he relies upon the observations made by Coulson J at paragraphs 54 and 55 of that judgment, but, in my judgment, the driver's expectation in that case was still that the pedestrian was waiting for the bus and that, again, is a very different set of circumstances to those prevailing as regards this accident the subject of this action. Mrs Hill was never anything other than walking down the road, not waiting, not standing, not stopping, and drivers know pedestrians do sometimes cross without looking. That is one of the things that you should be looking out for if you are actually being a careful driver. In my judgment it is not correct to say that simply because she was on the pavement she was not a hazard. If that were correct one would never be blameworthy for striking a pedestrian who steps from the sanctuary of the pavement and that is plainly too bold a submission.

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32. In the continuum of her pedestrian passage along the road at the end of Walton Vale at its junction with Regina Road she, like all pedestrians, represented a potential hazard who ought to stop and wait but might not do so. I am not satisfied that the expert evidence demonstrates that throughout that period of, say, a second or so before she comes to the kerb and the one and a half to two seconds from the kerb to the point of injury she was continuously invisible to Mr Watson. Therefore, in my judgment, he ought either to have seen her or been aware of the sinister potential of her disappearance from view, and either way not continued on his stop/start manoeuvre, and, in my judgment, it matters not for primary liability whether he was already in Regina Road or not, whether he was already moving past her or not, because whether she is stationary or not at that time he is moving his lorry towards her, which is why she was observed by all vainly trying to fend it off her before she was under its wheels. I, therefore, find that on this occasion Mr Watson's driving did fall below the standard that Mrs Hill was entitled to expect of him and that primary liability is established.

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33. I turn next to contributory negligence. The Law Reform (Contributory Negligence) Act 1945 provides at section 1:

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“Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons a claim in respect of that damage shall not be defeated by the reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.”

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This requires me to consider two aspects; the relative blameworthiness of the driver and the pedestrian and the causative potency of each. Those are the material issues. On my findings the claimant failed to look and see the lorry before simply stepping into the road when it ought to have been plain to her and was plain to others like Mr Ray who shouted a warning that it was unsafe for her to continue. Mr Watson, on the other hand, was driving slowly. He was trying to consider pedestrians but, for the reasons I have given, failing to do so properly. He was driving a large red, noisy lorry. The balance of blameworthiness, in my judgment, lies against the claimant and in favour of Mr Watson. However, as Latham LJ observed in *Lunt -v- Khelifa* [2002] EWCA Civ 801:

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“A motor vehicle is a potentially lethal weapon such that the causative potency balance must lie substantially the other way, in favour of the claimant and against the driver.”

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34. The submissions made by counsel are diametrically opposed in this case. Mr Cowan on behalf of the claimant submits that a proper apportionment, if I were to find primary liability but contributory negligence, is that the claimant should recover 75 per cent of the full liability value of the claim. Mr Kennedy, on the other hand, submits that I ought to award her only 25 per cent of the claim, finding instead contributory negligence to the extent of 75 per cent. In my judgment the two elements of blame and causation in fact balance each other out for the reasons that I have described and in those circumstances, in my judgment, a proper apportionment is 50/50.

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35. So at the conclusion of this matter, for the reasons that I have given, there will be judgment for the claimant for damages to be assessed at 50 per cent of the full liability value of her claim.

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(End of Judgment)

(Discussions/proceedings after judgment follow)

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